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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. DAMIAN ANTHONY REYES, Defendant and Appellant.	D070459 (Super. Ct. No. 12CF2993)

APPEAL from a judgment of the Superior Court of Orange County, Kazuhiro Makino, Judge. Affirmed.

Edward J. Haggerty, under appointment by the Court of Appeal for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler and Julie L. Garland, Assistant Attorneys General, A. Natasha Cortina and Meagan J. Beale, Deputy Attorneys General for Plaintiff and Respondent.

A jury found Damian Reyes guilty of committing a lewd act on a child during a residential burglary, and one count each of oral copulation and sexual penetration of a

child ten years of age or younger. The trial court sentenced Reyes to an aggregate life sentence with a minimum of 30 years in prison. Reyes appeals, contending that the trial court erred by: (1) admitting a video of an interview of the victim that occurred prior to trial; (2) instructing the jury with a modified version of CALCRIM No. 1128; (3) failing to instruct on the lesser included offense of sexual battery; (4) applying an inapposite standard in imposing consecutive sentences; (5) imposing a sentence that constitutes cruel and unusual punishment; and (6) imposing a restitution fine above the statutory minimum without a jury determination of the fine amount. To the extent that Reyes' counsel failed to object to any of the above errors, he asserts that his trial counsel provided ineffective assistance. We affirm.

GENERAL FACTUAL BACKGROUND

Since Reyes does not challenge the sufficiency of the evidence supporting his convictions, we briefly summarize his offenses.

Jose S. and his wife lived with their two daughters, O.S. (age 13) and H.S. (age 8) in a duplex in Santa Ana. On an evening in June 2012, the girls' cousin spent the night, sleeping in the lower bunk of a bunk bed with O.S., while H.S. slept in the top bunk. H.S. testified that a man put his hands on some "bad places" on her body in the night time. She was very scared and screamed. O.S. woke up to the sound of H.S. crying. O.S. got out of bed and saw a man on H.S.'s bed. H.S. was naked below the waist. The man was on top of her with his pants down. The man later jumped out the window and ran away.

After the man left, the girls went to the parent's bedroom to tell them what had occurred. Jose ran outside, but did not find the man. After reporting the incident to the police, Jose took H.S. to the hospital for a sexual assault examination. H.S. had a small abrasion on her genital area that was consistent with penetration of her genitals by a finger or hand. An enzyme found in saliva was located on H.S.'s left and right thighs, her vulva and outside her anus. DNA consistent with Reyes's DNA was found on H.S.'s left thigh and external anal area. The forensic scientist could not find complete DNA on H.S.'s vulva and vestibule areas, but found Y chromosome biological material in those locations. Y chromosomes are exclusive to males. Both samples were consistent with Reyes's DNA.

The following day, a Child Abuse Services Team (CAST) forensic social worker interviewed H.S. Among other things, H.S. told the social worker that Reyes took off her pants and underwear, licked her private part, touched her private part with his hand, and then flipped her over as she cried. H.S. stated that her "private part" is where she pees and poops. When asked whether Reyes touched her "inside" or "outside … where we wipe," H.S. believed that Reyes touched her inside. As Reyes did this, he moved his hand, hurting H.S. and causing her to scream. At trial, H.S. testified that she remembered the CAST interview, that she had told the truth to the CAST interviewer and that her memory was better at that time than at trial. After H.S. left the stand, the prosecution played a recording of the CAST interview for the jury before the CAST interviewer took the stand.

DISCUSSION

I. *Admission of Victim Interview*

A. Additional Background

In its trial brief, the prosecution indicated that it would seek to introduce H.S.'s out-of-court statements made to her family members, the police and during the CAST interview, under Evidence Code section 1360. The prosecution stated that "[t]he People do not intend to elicit any details about the molestation from H.S., given the trauma this incident caused her and the passage of time since the incident. However, the People believe that H.S. need only be subject to cross-examination in order to render her prior statements admissible pursuant to Evidence Code section 1360. Defense counsel will have the opportunity to question H.S. in detail about the molestation, should he choose to do so."

At the hearing on the motion, the prosecutor reiterated that she did not intend to ask H.S. any detailed questions about the actual molestation, and that she intended to rely on H.S.'s out-of-court statements to prove the charges against Reyes. Defense counsel objected to the admission of the CAST interview, but did not state any basis for the objection. The trial court ruled that the CAST interview DVD and transcript would be admitted, but concluded that H.S.'s statements to family members and the police would be cumulative and excluded them, pending her trial testimony.

At trial, the People called H.S. to testify. H.S. answered some general questions, including her current age (11-years-old) and agreed that she would tell the truth during her testimony. Regarding the incident, the prosecutor elicited that H.S. had been sleeping

in her bunk bed before "something bad happened to her," and that it was dark inside the bedroom at the time. H.S. also stated that she had told the truth to the police, that she remembered the CAST interview, and that she had told the truth to the CAST interviewer.

Defense counsel cross-examined H.S. without any objections from the prosecution. On cross-examination, H.S. could not describe the person who entered her bedroom, and said that she had never seen Reyes before. H.S. testified that the person had put his hand on her in "some bad places" and that she had been scared. Defense counsel also established that H.S.'s memory was better at the time the incident occurred than at trial.

B. Analysis

Reyes asserts that the trial court erred by admitting the CAST interview video because, he maintains, H.S. did not testify at trial within the meaning of Evidence Code section 1360. Reyes also contends that the admission of the CAST interview video violated his constitutional right to confrontation because he had no opportunity to cross-examine H.S. due to the prosecutor's election not to question her about the sex offense allegations. In the event that we reject this argument, Reyes contends, in the alternative, that the admission of the CAST interview video violated his due process right to a fair trial. The People assert that Reyes forfeited his claims by failing to specify the basis of his objection. The People note that if Reyes had raised these issues in the trial court, the court could have either required that the prosecutor question H.S. about the molestation,

or explicitly granted Reyes leeway to cross-examine H.S. on matters outside the scope of the direct examination.

The purpose of Evidence Code section 353 is to provide the trial court and any moving party the opportunity to meet and cure any defect to which an objection has been made. (*People v. Carrillo* (2004) 119 Cal.App.4th 94, 101.) Although defense counsel objected to the admission of the CAST interview, he stated no basis for the objection. As a result, he forfeited his claims for lack of timely and specific objections. (Evid. Code, § 353, subd. (a); *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305, 313-314, fn. 3 [claim of error forfeited by failure to object at trial based on Confrontation Clause]; *People v. Redd* (2010) 48 Cal.4th 691, 730 [failure to raise Sixth Amendment objection in the lower court forfeits that claim on appeal]; *People v. Chaney* (2007) 148 Cal.App.4th 772, 779-780 [Confrontation Clause analysis is "distinctly different than that of a generalized hearsay problem"; issue forfeited].)

Anticipating this result, Reyes argues in the alternative that his trial counsel was ineffective in failing to preserve these issues for review. A defendant claiming ineffective assistance of counsel must show not only that his or her counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, but also that it is reasonably probable that, but for counsel's failings, that the result would have been more favorable to the defendant. (*Strickland v. Washington* (1984) 466 U.S. 668, 687, 694.) There is a presumption that the challenged action " 'might be considered sound trial strategy' " under the circumstances. (*Id.* at p. 689.) Tactical errors are generally not reversible, and counsel's decision-making must be evaluated in the context

of the available facts. (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 86.) Here, defense counsel could have reasonably concluded that additional questioning might focus H.S.'s attention on exactly how she was touched and that as a result, she might be more likely to reveal information detrimental to Reyes at trial.

Even if Reyes's claims had been preserved, they would fail. Reyes contends, and the People do not dispute, that H.S.'s out-of-court statements were testimonial. (*People v. Cage* (2007) 40 Cal.4th 965, 989-990, fn. 20 [statements made by child abuse victim to forensic investigator designated by law enforcement are usually testimonial].) As the United States Supreme Court reiterated in *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*), however, when the declarant appears for cross-examination at trial, the confrontation clause "places no constraints at all on the use of [] prior testimonial statements." (*Id.*, at p. 59, fn. 9.) Thus, the question is whether the declarant, H.S., appeared for cross-examination.

Defense counsel cross-examined H.S. and chose to not question her at all about her hearsay statements made during the CAST interview. H.S.'s failure to testify about her statements during the CAST interview on direct examination did not prevent Reyes's counsel from cross-examining H.S. Evidence Code section 773, subdivision (a), limits the scope of cross-examination to "the scope of the direct examination by each other party to the action in such order as the court directs." "This is not a strait-jacket rule for the ordinary witness." (*People v. James* (1976) 56 Cal.App.3d 876, 887). A trial court has wide discretion in determining the appropriate scope of cross-examination. (*People v. Lancaster* (2007) 41 Cal.4th 50, 102.) Evidence Code section 772 subdivision (c),

specifically provides that "a party may, in the discretion of the court, interrupt his cross-examination . . . in order to examine the witness upon a matter not within the scope of a previous examination of the witness." Thus, defense counsel could have sought leave of court to question H.S. beyond the scope of her direct examination. In fact, defense counsel's cross-examination of H.S. regarding her identification of the assailant exceeded the scope of her direct examination, without triggering any objection by the People.

Reyes contends that if defense counsel had asked H.S. about the details of the assault, he risked "looking heartless and uncaring" and "would be placed in the virtually impossible position of both eliciting the charges from the witness and then seeking to impeach that very same testimony." Strategies existed to avoid this problem. For example, after the trial court admitted H.S.'s CAST interview, Reyes could have sought leave of court to recall H.S. during his case-in-chief to question her about the statements she made during the CAST interview. (Evid. Code, § 778. ["After a witness has been excused from giving further testimony in the action, he cannot be recalled without leave of the court. Leave may be granted or withheld in the court's discretion."].) Alternatively, defense counsel could have requested that both H.S.'s direct examination and the jury's viewing of the CAST interview precede his cross-examination of H.S. Reyes has not demonstrated that he was unable to cross-examine H.S.

We are not persuaded by Reyes's reliance on out-of-state authority holding that the confrontation clause requires that a child victim testify during direct examination about the alleged sexual abuse before hearsay statements of the child victim regarding the sexual abuse may be introduced in evidence. (See generally, *State v. Rohrich* (1997) 132

Wn.2d 472, 482 (*Rohrich*); *People v. Learn* (2009) 396 Ill.App.3d 891, 898-899 (*Learn*) [child witness was considered "unavailable" when child was unable or unwilling to testify in a courtroom setting].) The *Rohrich* opinion pre-dates *Crawford* and focuses on the meaning of "testify" as this term is used in the Washington hearsay statute; not whether the witness was available for cross-examination as required by *Crawford*. (*Rohrich, supra*, at pp. 475-482.) The Washington Supreme Court, in two post-*Crawford* opinions, has since distinguished *Rohrich* as being limited to situations where the prosecutor expressly acts to shield the child from testifying. (*State v. Clark* (1999) 139 Wn.2d 159, 161 [holding that confrontation clause is satisfied where complaining witness takes the witness stand and recants hearsay statements, but is available for cross-examination]; *State v. Price* (2006) 158 Wn.2d 630, 645, 650 [holding that confrontation clause is satisfied where complaining witness takes the witness stand and is unable to recall hearsay statements, but is available for cross-examination].) As we previously indicated, strategies exist to address prosecutorial shielding. Additionally, much of the Illinois judiciary has distanced itself from *Learn*. (*People v. Vannote* (2012) 361 Ill. Dec. 72, 79-80 [listing cases that have specifically distinguished *Learn*].)

Reyes fares no better on his state law claim. Evidence Code section 1360 permits the admission in evidence of the out-of-court statements made by a young victim recounting acts of child abuse or neglect if, in addition to proper notice being given, the court finds sufficient indicia of reliability in the statements, and the child either "testifies at the proceedings", or, if the child is unavailable, there is independent corroboration of the abuse. The trial court's admission of evidence under Evidence Code section 1360 is

reviewed for an abuse of discretion. (*People v. Roberto V.* (2001) 93 Cal.App.4th 1350, 1367.)

H.S. took the stand and was available for cross-examination. Nonetheless, Reyes contends that the trial court erred in admitting her CAST interview under Evidence Code section 1360 because H.S. did not "testify" on direct examination regarding the details of the alleged molestation. To support his assertion, Reyes relies on the definition of "testify" adopted by the *Rohrich* and *Learn* courts. (*Rohrich*, *supra*, 132 Wn.2d at p. 481 [" 'testifies,' as used in RCW 9A.44.120(2)(a), means the child takes the stand and describes the acts of sexual contact alleged in the hearsay"]; *Learn*, *supra*, 396 Ill.App.3d at p. 900 [construing "testifies at the proceeding" as found in 725 ILCS § 5/115-10 as requiring the child to testify and accuse the defendant; "[i]mmaterial or general background 'testimony' is not sufficient"].)

When interpreting a statute, "[w]e must look to the statute's words and give them 'their usual and ordinary meaning.' " (*Imperial Merchant Services, Inc. v. Hunt* (2009) 47 Cal.4th 381, 387.) "If there is no ambiguity in the language of the statute, 'then the Legislature is presumed to have meant what it said, and the plain meaning of the language governs.' [Citation.] 'Where the statute is clear, courts will not "interpret away clear language in favor of an ambiguity that does not exist." [Citation.]' " (*Lennane v. Franchise Tax Bd.* (1994) 9 Cal.4th 263, 268.) To "testify" means "[t]o give evidence as a witness." (Black's Law Dictionary (10th ed. 2014), p. 1704; see also, Random House Unabridged Dict. (2d ed. 1993) p. 1961 [testify means "to give testimony under oath or solemn affirmation, usually in court".) The word "testify" as used in Evidence Code

section 1360 is unambiguous and we decline to embrace the meaning adopted by the *Rohrich* and *Learn* courts.

Accordingly, we conclude that H.S. testified at trial within the meaning of Evidence Code section 1360 and that the trial court did not err in admitting H.S.'s CAST interview.

II. *CALCRIM No. 1128*

Reyes contends that the pattern instruction for sexual penetration that the trial court used in instructing the jury, CALCRIM No. 1128, was deficient because it did not inform the jury of the specific intent required for the crime. We are not persuaded.

The validity of a jury instruction is a question of law reviewed de novo. (*People v. Burch* (2007) 148 Cal.App.4th 862, 870.) We review a purportedly erroneous jury instruction by inquiring whether a reasonable likelihood exists that the jury applied the challenged instruction in such a way as to violate the Constitution. (*People v. Richardson* (2008) 43 Cal.4th 959, 1028.) In performing this review, we examine the jury instructions as a whole. (*Ibid*.) Further, we presume that jurors are intelligent and sufficiently " 'capable of understanding and correlating all jury instructions which are given.' " (*Ibid*.) " 'Instructions should be interpreted, if possible, so as to support the judgment rather than defeat it if they are reasonably susceptible to such interpretation.' " (*People v. Ramos* (2008) 163 Cal.App.4th 1082, 1088.)

The People charged Reyes with digitally penetrating H.S., in violation of Penal Code[1] section 288.7, subdivision (b). The act of sexual penetration is defined as "causing the penetration, however slight, of the genital or anal opening of any person … for the purpose of sexual arousal, gratification, or abuse. . . ." (§ 289, subd. (k)(1).) Thus, unlawful sexual penetration requires committing the offense with "the specific intent to gain sexual arousal or gratification or to inflict abuse on the victim." (*People v. McCoy* (2013) 215 Cal.App.4th 1510, 1538.)

In relevant part, CALCRIM No. 1128 instructed the jury that "[s]exual penetration means penetration, . . . *for the purpose of* sexual abuse, arousal, or gratification." While Reyes is correct that the word "intent" does not appear in CALCRIM No. 1128, the other instructions fully informed the jury of the specific intent that it had to find beyond a reasonable doubt in order to find him guilty of unlawful sexual penetration. Specifically, the trial court instructed the jury with CALCRIM No. 252 regarding the requirement of "proof of the union, or joint operation, of act and wrongful intent." This instruction correctly specified that sexual penetration of a minor required that the defendant "must not only intentionally commit the prohibited act, but must do so with a specific intent. The act and the specific intent required are explained in the instruction for that crime or allegation." Thus, the jury was instructed that Reyes must have acted intentionally and for the purpose of sexual abuse, arousal, or gratification. The court simply provided

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1 Undesignated statutory references are to the Penal Code.

these requirements in two separate instructions (CALCRIM Nos. 252 and 1128). Reyes points to nothing in the record that would suggest juror confusion on this issue.

" 'Moreover, any theoretical possibility of confusion [may be] diminished by the parties' closing arguments. . . .' " (*People v. Hajek and Vo* (2014) 58 Cal.4th 1144, 1220.) In this case, the prosecutor told the jury that count 3 (sexual penetration of a minor) required specific intent and that she had to prove that Reyes touched the inside of H.S.'s genitals "for the purpose of arousal. . . ." The prosecutor later told the jury that "where [the instruction] says 'for the purpose of' is where the mental state comes in."

In summary, in light of the instructions given and the prosecutor's argument, we conclude that the jury was properly instructed regarding the required specific intent for the offense and that it is not reasonably likely that the jury applied the challenged instruction in an impermissible manner. (*People v. Hajek and Vo*, *supra*, 58 Cal.4th at p. 1220.) In any event, even assuming error, there is no conceivable purpose for Reyes's acts of climbing into the bed of a young child, pulling his pants down, taking off H.S.'s pants and underwear, and touching, penetrating and licking her genitals, other than for sexual arousal or gratification.

III. *Alleged Failure to Instruct on Lesser Included Offense*

During the CAST interview, the interviewer asked H.S. whether Reyes had touched her on the outside or inside part. H.S. responded: "I think it was inside." Reyes contends that the trial court prejudicially erred because it failed to instruct the jury on sexual battery (§ 243.4, subd. (e)) as a lesser included offense of [forcible] sexual penetration of a minor 10 years or younger (§ 288.7, subd. (b)). He asserts that the lack

of instruction on sexual battery resulted in prejudicial error because a jury instructed on that offense likely would have convicted him of the lesser offense in light of the ambiguous evidence of penetration. We disagree.

A defendant may not be convicted of an offense that is included within another offense. (*People v. Reed* (2006) 38 Cal.4th 1224, 1227 (*Reed*).) A trial court has a sua sponte duty to instruct the jury on a lesser included offense "when the record contains substantial evidence of the lesser offense, that is, evidence from which the jury could reasonably doubt whether one or more of the charged offense's elements was proven, but could find all the elements of the included offense proven beyond a reasonable doubt." (*People v. Moore* (2011) 51 Cal.4th 386, 408-409.) To determine whether one offense is necessarily included within another, we look to the statutory elements of the offenses. "[I]f the statutory elements of the greater offense include all of the statutory elements of the lesser offense, the latter is necessarily included in the former." (*Reed*, *supra*, at p. 1227.) Where, as here, the challenge is to a charged offense, we do not look to the accusatory pleadings. The pleadings are relevant only when the question is whether a defendant may be convicted of an uncharged crime. (*Id.* at pp. 1228-1231.)

Application of the elements test demonstrates that sexual battery under section 243.4, subdivision (e)(1), is not a lesser included offense of sexual penetration of a minor 10 years or younger. The elements of sexual penetration of a minor 10 years or younger are as follows: (1) the defendant is 18 years of age or older; (2) the minor victim is 10 years of age or younger; (3) the defendant commits an act of sexual penetration of the minor; (4) the penetration was accomplished by means of a foreign object, substance,

instrument, device or unknown object (including a body part other than a sexual organ); and (5) the act was committed for the purpose and specific intent of sexual gratification, arousal or abuse. (§§ 288.7, subd. (b), 289, subd. (k)(1).)

The elements of misdemeanor sexual battery are: (1) touching the intimate part of another person (the sexual organ, anus, groin or buttocks of any person, and the breast of a female); (2) *against the will of that person*; and (3) with the specific intent to cause sexual arousal, gratification or abuse. (§ 243.4, subd. (e)(1), italics added; *People v. King* (2010) 183 Cal.App.4th 1281, 1319.) Sexual battery contains the element that the touching be "against the will" of the person being touched, an element not contained in the crime of sexual penetration of a minor 10 years or younger. To address this obvious inconsistency, Reyes contends that, under California law, minors are presumed incapable of consent to sexual acts such as sexual penetration; thus, the "against the will" element is implicit in the sexual penetration of a minor offense. (*People v. Soto* (2011) 51 Cal.4th 229, 248 (*Soto*).)

Reyes's argument fails to acknowledge that the crime of sexual penetration of a minor 10 years or younger (§ 288.7, subd. (b)) can be applied only to a minor 10 years old or younger, while the crime of sexual battery (§ 243.4, subd. (e)) applies to an adult victim. As the People note, in the context of sexual crimes, " 'against the victim's will' " is synonymous with " 'without the victim's consent.' " (*People v. Giardino* (2000) 82 Cal.App.4th 454, 460.) Because a minor is legally incapable of giving consent, lack of consent is not an element that must be proved because it cannot be proved. Stated differently, a child victim's consent is immaterial as a matter of law to the crime of sexual

penetration of a minor 10 years or younger. (See *Soto, supra,* 51 Cal.4th at p. 238; *People v. Hillhouse* (2003) 109 Cal.App.4th 1612, 1619 ["the concept of consent, whether legal or actual, is actually *irrelevant* to the determination of whether [statutes governing sexual contact with minors] have been violated"].) As a result, crimes against those legally incapable of consenting "contain different elements [ ] than the provisions governing sexual contact with minors." (*People v. Hillhouse*, *supra*, at p. 1621.) Accordingly, the trial court did not err in not instructing on the offense of sexual battery.

IV. *Consecutive Sentencing*

The trial court sentenced Reyes to a term of 15 years to life on each of the section 288.7 subdivision (b), counts of sexual penetration and oral copulation with a child 10 years of age or younger (counts 2 & 3), and ordered that the sentences run consecutively because the crimes consisted of two separate acts and Reyes had time to reflect on his actions. Reyes contends that the trial court erred in imposing consecutive sentences because the court used the standard for mandatory and discretionary consecutive sentencing under subdivisions (c) and (d) of section 667.6, which are inapplicable to sentences imposed under section 288.7. He asserts that the matter should be remanded to allow the trial court to apply the correct standards under California Rules of Court, rule 4.425.[2] The record does not support Reyes's contention.

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2 Undesignated rule references are to the California Rules of Court.

As a preliminary matter, the People assert that Reyes forfeited this claim by failing to object at trial. Reyes claims that defense counsel had no meaningful opportunity to object because after the trial court announced its sentencing choices, it immediately proceeded to address the award of credits and imposition of the restitution fine.

"A party in a criminal case may not, on appeal, raise 'claims involving the trial court's failure to properly make or articulate its discretionary sentencing choices' if the party did not object to the sentence at trial." (*People v. Gonzalez* (2003) 31 Cal.4th 745, 751.) The waiver doctrine applies to alleged sentencing error only when a defendant had a "meaningful opportunity to object." (*People v. Scott* (1994) 9 Cal.4th 331, 356.) After announcing its sentence, the trial court immediately transitioned to credits and fines without pausing to ask counsel whether there were any objections. If defense counsel had interrupted the trial court, it is likely that the court would have considered any objection to the manner in which it made or articulated its discretionary sentencing choices. However, in light of Reyes's alternative claim that trial counsel's failure to object constituted ineffective assistance, we will review the merits of Reyes's argument.

Section 288.7, subdivision (b), provides that the punishment for an adult who engages in oral copulation or sexual penetration with a child as young as H.S. "shall be" 15 years to life in state prison. The jury convicted Reyes of two separate counts of this offense. It was within the trial court's discretion to impose either concurrent or consecutive terms. (§ 669, subd. (a); *People v. Bradford* (1976) 17 Cal.3d 8, 20.) A sentencing court is required to provide a statement of reasons when imposing consecutive

sentences. (Rule 4.406(a), (b)(5).) In exercising this discretion, the court is to consider whether the crimes and their objectives were predominantly independent of each other, involved separate acts or threats of violence, and were committed at different times or separate places rather than being committed "so closely in time and place as to indicate a single period of aberrant behavior," as well as any other circumstances in aggravation or mitigation. (Rule 4.425 (a) & (b).) However, the trial court is not required to find that an aggravating circumstance exists to justify the imposition of consecutive terms. (*People v. Crabtree* (2009) 169 Cal.App.4th 1293, 1324.)

We review a trial court's decision to impose consecutive sentences for abuse of discretion. (*People v. Bradford*, *supra*, 17 Cal.3d at p. 20.) A court is presumed to have been aware of and followed the applicable law and considered all the relevant facts. (Evid. Code, § 664.) It is well established that a trial court's order "is presumed to be correct, error is never presumed, and the appealing party must affirmatively demonstrate error on the face of the record." (*People v. Davis* (1996) 50 Cal.App.4th 168, 172.)

Reyes's assertion that the trial court erroneously applied the standard for mandatory and discretionary consecutive sentencing under subdivision (d) of section 667.6 is not supported by the record. Subdivision (d) of section 667.6, provides that "[i]n determining whether crimes against a single victim were committed on separate occasions under this subdivision, the court shall consider whether, between the commission of one sex crime and another, the defendant had a reasonable opportunity to reflect upon his or her actions and nevertheless resumed sexually assaultive behavior." Reyes speculates that the trial court erroneously relied on subdivision (d) of section 667.6

because, in imposing sentence, the trial court referred to Reyes's opportunity to reflect on his actions.

The prosecutor's sentencing brief discussed the choice of consecutive or concurrent sentences, noting that the trial court had discretion to impose the terms consecutively or concurrently. The People asked the trial court to impose the sentences consecutively, properly referencing section 669, rule 4.425, and the rule 4.421 factors in aggravation that applied. The trial court read the sentencing briefs together with the probation report.

The record shows that the trial court understood its discretion to order concurrent or consecutive sentences on counts 2 and 3 under subdivision (a) of section 669. The prosecutor did not refer to section 667.6 in its sentencing memorandum, in which it urged the imposition of consecutive life terms, and the court did not refer to section 667.6 in explaining its sentencing decision. There is nothing in the record that suggests that the court misunderstood its discretion in sentencing Reyes under sections 288.7 and 669, subdivision (a). While the reasoning that the trial court used in determining whether to impose consecutive sentences is similar to the test set forth in subdivision (d) of section 667.6, the trial court's comments reflect a proper exercise of discretion to find as an aggravating factor the commission of two separate violent acts, based on H.S.'s statements that despite her crying after Reyes licked and touched her genital area, he proceeded to flip her over and continued his assault until his actions caused her to scream in pain. (Rule 4.425(a)(2).) Remand for resentencing is not required because Reyes has

not overcome the presumption that the trial court understood its sentencing duty under subdivision (a) of section 669.

V. *Cruel and Unusual Punishment*

Reyes contends that the two consecutive terms of 15 years to life that the trial court imposed are grossly disproportionate to his crimes and are therefore cruel and/or unusual under the state and federal constitutions. The trial court rejected this argument, stating that the sentence was not cruel or unusual in that it reflected the view of the Legislature regarding the serious nature of sex crimes.

The Eighth Amendment to the United States Constitution prohibits cruel and unusual punishment. (U.S. Const., 8th Amend.) The California Constitution prohibits cruel or unusual punishment (Cal. Const., art. I, § 17.) Under either constitution, a sentence may be unconstitutional if it is grossly disproportionate to the crime committed. (*Graham v. Florida* (2010) 560 U.S. 48, 59-60; *People v. Dillon* (1983) 34 Cal.3d 441, 478.) Whether a sentence constitutes cruel or unusual punishment is a question of law that we review de novo, viewing the underlying facts in the light most favorable to the judgment. (*People v. Mantanez* (2002) 98 Cal.App.4th 354, 358.) A defendant must overcome a "considerable burden" when challenging a penalty as cruel or unusual. (*People v. Wingo* (1975) 14 Cal.3d 169, 174.)

Under the United States Constitution "[t]he Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are 'grossly disproportionate' to the crime. [Citations.]" (*Harmelin v. Michigan* (1991) 501 U.S. 957, 1001 (conc. opn. of Kennedy, J.), citing *Solem v. Helm*

(1983) 463 U.S. 277, 288.) Successful grossly disproportionate challenges are " 'exceedingly rare' " and appear only in an " 'extreme' " case. (*Lockyer v. Andrade* (2003) 538 U.S. 63, 73.) We are not convinced that this is such a case.

"Viewed along a spectrum, we may find murder, mayhem and torture among the most grave of offenses and petty theft among the least. Considered in this context, lewd conduct on a child may not be the most grave of all offenses, but its seriousness is considerable. It may have lifelong consequences to the well-being of the child." (*People v. Christensen* (2014) 229 Cal.App.4th 781, 806.)

Reyes broke into a home in the middle of the night and committed sex crimes against a young child, one of society's most vulnerable victims, while the child slept in her own bed. (Cf. *Ashcroft v. Free Speech Coalition* (2002) 535 U.S. 234, 244 ["sexual abuse of a child is a most serious crime and an act repugnant to the moral instincts of a decent people"].) Based on the nature of the offense, we conclude that the sentence imposed is not grossly disproportionate to the crime and is therefore not the exceedingly rare and extreme case that violates the federal constitution.

Article I, section 17 of the California Constitution prohibits "[c]ruel or unusual punishment." A sentence violates this prohibition if the punishment is so disproportionate to the crime for which it was imposed that it "shocks the conscience and offends fundamental notions of human dignity." (*In re Lynch* (1972) 8 Cal.3d 410, 424.) We apply a three-part test to determine whether a particular sentence is disproportionate to the offense for which it is imposed. First, we examine "the nature of the offense and/or the offender, with particular regard to the degree of danger both present to society." (*Id.*

at p. 425.) Second, we compare the punishment imposed with punishments prescribed by California law for more serious offenses. (*Id.* at pp. 426-427.) Third, we compare the punishment imposed with punishments prescribed by other jurisdictions for the same offense. (*Id.* at pp. 427-429.) "Only in the rarest of cases could a court declare that the length of a sentence mandated by the Legislature is unconstitutionally excessive." (*People v. Martinez* (1999) 76 Cal.App.4th 489, 494.)

Examining the nature of the offenses and the offender, Reyes was 26 years old and the father of two young children at the time he molested H.S. Reyes notes that he used no threats or weapons, that H.S. suffered only a minor abrasion, and that all of the charges arose out of a single incident. Taken to its essence, Reyes essentially argues that his offenses could have been worse. While this is true, Reyes downplays the jury's finding that he broke into a home for the purpose of committing a lewd or lascivious act on a child under the age of 14 years. Reyes, who had two young children of his own, did not stop his assault when H.S. started crying. Rather, he repositioned H.S. and continued his assault. He did not stop until H.S.'s sister became aware of his presence. More troubling is Reyes's claim to have no recollection of the incident and his admission to suffering " 'blackouts' " after drinking too much. Testing revealed that Reyes posed a moderate-high risk of reoffending if released on probation. While Reyes received a severe sentence, in view of these facts, it is not so severe or disproportionate as to shock the conscience or offend fundamental notions of human dignity.

As to punishment for other crimes in California, Reyes notes that he was convicted and sentenced under a statute that imposes a punishment equal to that for second degree

murder, although his offense did not involve violence, threats of violence, or the infliction of serious bodily injury. "Section 667.61 mandates indeterminate sentences of 15 to 25 years to life for specified sex offenses that are committed under one or more 'aggravating circumstances,' . . . 'to ensure serious and dangerous sex offenders would receive lengthy prison sentences upon their first conviction,' "where the nature or method of the sex offense "place[d] the victim in a position of *elevated vulnerability*." [Citation.]' [Citation.]" (*People v. Alvarado* (2001) 87 Cal.App.4th 178, 186.)

In *People v. Estrada* (1997) 57 Cal.App.4th 1270 (*Estrada*) another appellate court rejected the defendant's claim of cruel or unusual punishment under the California Constitution regarding the imposition of a 25 years to life sentence under section 667.61 after the defendant committed a rape and a first degree burglary with the intent to commit forcible rape. (*Id.* at pp. 1277-1282.) As the *Estrada* court observed: "Burglary of an inhabited dwelling also poses a risk to human life. . . .When we add to the risk of residential burglary the risk of rape by means of 'force, violence, duress, menace, or fear of immediate and unlawful bodily injury' (§ 261, subd. (a)(2)) it is clear the punishment of life *with* the possibility of parole after 25 years is not constitutionally out of line with other California punishments." (*Estrada, supra,* at pp. 1281-1282.)

Reyes faced a term of 25 years to life for committing a lewd act on a minor during a residential burglary (count 1). (§ 667.61, subd. (a).) For his crimes of orally copulating and sexually penetrating a child 10 years of age or younger, the statutory sentence is 15 years to life (counts 2 & 3). (§ 288.7, subd. (b).) Thus, Reyes's potential exposure was 55 years to life. The trial court imposed consecutive sentences of 15 years to life on

counts 2 and 3, and ran the sentence on count 1 concurrently with these sentences. Thus, Reyes's aggregate sentence of 30 years to life is only *slightly* higher than the sentence for committing a lewd act during a burglary, by itself. Children are particularly vulnerable victims, and "great deference is ordinarily paid to legislation designed to protect children, who all too frequently are helpless victims of sexual offenses." (*In re Wells* (1975) 46 Cal.App.3d 592, 599.) Given the circumstances of this case, Reyes's sentence is not shocking or outrageous.

On the final prong of the analysis, Reyes compares the punishment in California for oral copulation and sexual penetration with a minor with the punishment for these crimes in 10 other jurisdictions. Reyes represents that the punishment for these crimes is the same in Ohio as it is in California, and harsher in Florida, Kansas and Nevada. As to six other jurisdictions, Reyes represents that trial courts have the discretion to impose a determinate term, usually with a statutory minimum, but without the prospect of life imprisonment. The statutory *minimum* terms for these six jurisdictions vary from five years to 20 years. The statutory *maximum* terms vary from a low of 20 years to a high of 99 years.

We acknowledge that differences exist among California's statute governing oral copulation and sexual penetration with a minor, and the statutes in other states for these crimes. Generally, however, other jurisdictions impose lengthy prison terms for similar offenses. Thus, Reyes has not shown that his punishment is disproportionate to the punishment that he could have received in other jurisdictions for the same crimes.

Accordingly, we conclude that Reyes's sentence does not constitute cruel and/or unusual punishment under either the California Constitution or the United States Constitution.

VI. *Restitution Fine*

Reyes asserts that the trial court violated his rights to a jury trial and to proof of facts beyond a reasonable doubt when it imposed a $500 restitution fine under subdivision (b)(1) of section 1202.4. Reyes relies on a United States Supreme Court decision, *Southern Union Co. v. United States* (2012) 567 U.S. __ [132 S. Ct. 2344] (*Southern Union Co.*), to support his contention that jury findings were required on the question of whether he had the ability to pay a restitution fine above the statutory minimum, the gravity of the crimes, and the nature of their commission. Reyes concedes that one appellate court rejected a similar argument in *People v. Kramis* (2012) 209 Cal.App.4th 346 (*Kramis*).

To the extent that Reyes forfeited this claim by not objecting in the trial court, he asserts that any objection would have been futile under existing law. Alternatively, Reyes again argues that, to the extent his claims are forfeited, his trial counsel provided ineffective assistance. Assuming, without deciding, that the instant claim is properly before us, Reyes's argument fails on the merits.

In *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*) the United States Supreme Court held: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Id.* at p. 490.) "[T]he 'statutory maximum'

for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." (*Blakely v. Washington* (2004) 542 U.S. 296, 303, italics omitted.) "[T]he rule of *Apprendi* applies to the imposition of criminal fines." (*Southern. Union Co.*, *supra*, 567 U.S. __ [132 S. Ct. at p. 2357].) However, "nothing in [the common law and constitutional history] suggests that it is impermissible for judges to exercise discretion—taking into consideration various factors relating both to offense and offender—in imposing a judgment *within the range* prescribed by statute." (*Apprendi*, *supra*, at p. 481.)

In *Southern Union Co.*, the United States Supreme Court applied *Apprendi* to the imposition of a criminal fine for violation of federal environmental laws. (*Southern Union Co.*, *supra*, 567 U.S. at pp. __ [132 S. Ct. at pp. 2349–2356].) The *Kramis* court explained that *Southern Union Co.* does not mean that the imposition of every type of criminal fine is suspect under *Apprendi*. "The statutory fine imposed in *Southern Union Co.* was $50,000 for *each day* of violation. In other words, the amount of the fine was tied to the *number of days the statute was violated.* In *Southern Union Co.*, the trial court, not the jury, made a specific finding as to the number of days of violation. The United States Supreme Court held the district court's factual finding as to the number of days the defendant committed the crime violated *Apprendi*. (*Southern Union Co.*, *supra*, 567 U.S. at p. __ [132 S. Ct. at p. 2352].)" (*Kramis*, *supra*, 209 Cal.App.4th at p. 351.)

The reasoning in *Kramis* is persuasive. Section 1202.4, subdivision (a)(3), requires that in imposing sentence in a criminal case, the trial court impose a restitution fine. Although the statutory minimum restitution fine under section 1202.4 differs

depending on when the crime occurred, the version of section 1202.4 at issue in *Kramis* did not differ in any material respect from the version of section 1202.4 at issue in this case. Section 1202.4 contemplates an exercise of discretion by the trial court regarding factors relating to the offense and the offender in setting a fine within the prescribed range, as explicitly permitted by *Apprendi*. (§ 1202.4, subd. (d) ["In setting the amount of the fine pursuant to subdivision (b) in excess of the minimum fine pursuant to paragraph (1) of subdivision (b), the court shall consider any relevant factors"]; see *Apprendi*, *supra*, 530 U.S. at p. 481.) Because there is no dispute that the trial court imposed a fine within the range prescribed by statute, we conclude that the trial court properly exercised its discretion in imposing the $500 restitution fine.

DISPOSITION

The judgment is affirmed.

AARON, J.

WE CONCUR:

HALLER, Acting P. J.

O'ROURKE, J.